Supreme Court, U.S.
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No. 94-1255

In The

Supreme Court of the United States

October Term, 1994

JAMES F. SEXTON,

Petitioner,

vs.

CITY OF TWINSBURG,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 15, 1995

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QUESTIONS PRESENTED

1. Is it a denial of the Due Process and Equal Protection Clauses of the Fourteenth Amendment for the appellate courts of a State to deny review to a litigant on the merits of his case by refusing to consider the evidence in a Narrative Statement of Evidence on the ground that it was not submitted to and approved by the trial court where adverse party fails to object to or propose amendments to the Narrative Statement as permitted by rule, and the appellate court is empowered by rules to correct the omissions, thus raising a presumption of correctness of the evidence in the Narrative Statement.

2. Is it a denial of the Due Process and Equal Protection Clauses under the Fourteenth Amendment to the United States Constitution where the appellate courts of a state deny to a litigant an appellate review of the merits of his case.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent City of Twinsburg respectfully requests that the Court deny the petition for Writ of Certiorari submitted by petitioner.

OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's identification as to Opinions below, Jurisdiction of the Court and Statutory Provisions Involved.

STATEMENT OF THE CASE

Petitioner James F. Sexton was charged with a violation of Twinsburg Codified Ordinance 333.03, Failure to Maintain an Assured Clear Distance.

After Mr. Sexton entered a plea of not guilty, this matter was tried to the Court in Cuyahoga County Falls Municipal Court. Trial Court rendered a finding of guilty and fined the Petitioner $25.00 and costs. Petitioner filed a motion for a new trial which was denied.

Thereafter, petitioner appealed to the Court of Appeals, Ninth Judicial District. Both his appeal and a Motion for Reconsideration were denied. Petitioner failed to follow Appellate Rule 10(B) which states that the record to be complete must be submitted and approved by the trial court and filed with the clerk of the trial court.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because petitioner has failed to establish a basis for review by this Court. Appellate Rule 9(C) imposes upon petitioner the affirmative duty to provide a complete record. Failure to do so is proper grounds for dismissal.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. APPELLATE RULE 9(C) IMPOSES UPON PETITIONER THE AFFIRMATIVE DUTY TO INSURE THE STATEMENT OF EVIDENCE AND ANY OBJECTION IS SUBMITTED TO TRIAL COURT FOR SETTLEMENT AND APPROVAL, AND FAILURE TO DO SO IS GROUNDS FOR DISMISSAL OF THE APPEAL.

In the case at bar, a transcript of what had occurred in the trial court was not available for reasons stated earlier. Therefore, Petitioner availed himself of the relief provided under Appellate Rule 9(C). Briefly stated, Petitioner had the duty to prepare a statement of evidence and serve same on Respondent for his approval. Thereafter, the rule states that the statement and any objection of the proposed amendments shall be forthwith submitted to the trial court for settlement and approval. After the trial court has approved the statement, the rule provides that the statement shall be included by the Clerk of Court for the record on Appeal.

A clear and logical reading of Appellate Rule 9(C) in its entirety indicates that certain requirements are imposed upon petitioner to properly prepare the record for appeal. Not only must he prepare such a statement of the evidence and serve same upon respondent, the statement must be submitted forthwith to the trial court for its review. Nowhere in this rule can it be implied that this duty is imposed upon the Clerk of the trial court as petitioner alleges. The Court of Appeals for the Ninth

Judicial District clearly and correctly failed to accept Petitioner's argument that this burden was not upon Petitioner. As stated in the matter of *Knapp v. Edwards Laboratories,* 62 Ohio St. 2d 197 (1980):

> Upon appeal of an adverse judgment, it is the duty of the petitioner to insure that the record or whatever portions thereof are necessary for determination of the appeal filed with the court in which he seeks relief.

Rose Chevrolet Inc. v. Adams, 36 Ohio St. 3rd 17 (1988).

In *Knapp,* the court stated that the duty to provide a transcript for appellate review falls upon the petitioner. This is necessarily so because a petitioner bears the burden of showing error by reference to matters in the record. See *State v. Skaggs,* 3 Ohio St. 2d 162 (1978).

The burden in the case cited by Petitioner is clearly distinguishable from the issue at hand. In *Cobb v. Cobb,* (1988) 62 Ohio St. 2d 124, the clerk failed to include an item in the record after petitioner had filed the proper parricide. The Supreme Court stated that the omission was based on the nonfeasance of the trial court clerk and thus relief under Appellate Rule 9(E) was appropriate. Thus, in *Cobb,* petitioner had correctly made the request of the trial court clerk, but the clerk had failed to properly follow the instructions given.

However, in the case at hand, petitioner himself failed to affirmatively comply with the clear mandates of Appellate Rule 9(C). A reading of that section reveals that Petitioner has the burden of doing certain items, including submitting the statement for approval by the trial court. Thereafter, the burden is placed upon the clerk of

the trial court to include that item plus all other items in the record on appeal.

Thus, since Petitioner failed to follow the dictates of Appellate Rule 9(C), the Appellate Court correctly stated that Petitioner did not meet his burden and that the Motion for Reconsideration is thus denied.

CONCLUSION

For the reasons stated above, respondent respectfully requests that the relief sought by Petitioner should be denied.

Respectfully submitted,

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